be followed in a situation where the escrow-grantee was not permitted to occupy the premises.

Although some question might be raised as to whether a judgment creditor is a bona fide purchaser, he has been treated as such in *Rathmell* v. *Shirey*, 60 Ohio St. 187 (1899), and in *Crooks* v. *Crooks*, 34 Ohio St. 610 (1878).

JOHN W. TANNER.

EQUITY

JURISDICTION OF EQUITY TO RELIEVE ONE CONVICTED OF A CRIME ON PERJURED TESTIMONY WHERE STATUTE OF LIMITATIONS BARS LEGAL RELIEF

The plaintiff was convicted on perjured testimony of the crime of assault to rape. Ohio Gen. Code. Sec. 13449-2 provides that a motion for a new trial on newly discovered evidence must be filed within 120 days following the rendering of the verdict. This statute had run when the plaintiff discovered new facts showing that his conviction was on perjured testimony. Relief was sought in equity to vacate the judgment and to secure a new trial. A demurrer to the bill was overruled and judgment entered for the plaintiff. Error was prosecuted to the Court of Appeals and the ruling of the trial court reversed. To grant the relief prayed for would be overruling the expressed intent of the legislature, and 'while one maxim of equity recites that it will not suffer a wrong to be without a remedy, another states that equity follows the law." *State* v. *Vaughn*, 21 Ohio L. Abst. 585 (1936).

The court had a hard problem before it but not one entirely dissimilar from that which equity was faced with in working out the doctrine of part performance to remove the bar of the Statute of Frauds, *Butcher* v. *Stapely*, 1 Vern. 363 (1685). Probably the first case advancing fraud as the rationale of this doctrine was *Mullet* v. *Halfpenny*, Prec. Ch. 404 (1699). Equity from that time on has given relief in certain types of cases notwithstanding the expressed legislative intent, and in this state even applies the equity doctrine to law cases. *Wilbur* v. *Paine*, 1 Ohio 251 (1824), *O'Hara* v. *O'Hara*, 16 Ohio C.C. 367, 9 Ohio C.D. 293 (1898), *Hodges* v. *Ettinger*, 127 Ohio State 460.

Similarly, the problem of the Statute of Limitation arose early in equity, and the general rule was laid down that equity follows the

statute by analogy only. *Robinson* v. *Fife*, 3 Ohio State 551 (1854), *Glass* v. *Courtright* 14 Ohio N.P. (NS) 273, 23 Ohio Dec. 253, 58 Bull. 165 (1913). A statute barring a legal action does not necessarily affect the general doctrines of equity or the principles upon which relief is granted in particular cases, and often such statutes are avoided in equity where to enforce them would be inequitable and unjust. *Peters* v. *Delaplaine*, 49 N.Y. 362 (1872), *Russell* v. *Fourth Nat. Bank*, 102 Ohio St. 248 (1921), *Kelley* v. *Boetcher*, 85 Fed. 55 (1898). It would seem that the court might have relied upon the above analogies and granted the injunction against the enforcement of the judgments secured by perjured testimony even though not discovered until after the 120 day statute had elapsed.

The use of equitable maxims as an approach in the decision of a case is of doubtful merit. There are numerous instances where, in deciding specific questions, the broad generalizations in the maxims are ignored. The maxim "equity abhors a multiplicity of suits," was not controlling in *Hale* v. *Allison*, 188 U.S. 56, 23 Sup. Ct. 244 (1902). In spite of the maxim "that he who comes into equity must come in with clean hands," equity intervened to protect a wrongdoer where the parties were not in pari delicto. *Coleman* v. *Coleman*, 61 Pac. (2d) 441 (Arizona 1936), *Mueller* et ux v. *Michels*, 184 Wis. 324 (1924), 199 N.W. 380, *Ogden* v. *Straus Bldg. Corp.*, 187 Wis. 232 (1925), 202 N.W. 34. The rules of equity must necessarily be sufficiently elastic to do equity in a given case. *Thatcher* v. *Thatcher*, 117 Me. 331, 104 Atl. 515, (1918).

The court points out in the principal case that it follows the policy of not disturbing adjudications on the theory that there must be some end to litigation. *Michael* v. *American Nat. Bank*, 84 Ohio St. 370 (1911). Such a policy may be desirable, but the injustice that would be done here to the victim of perjury is obviously a high price to pay for its maintenance.

Fraud was recognized as a ground for relief in the early development of equity, although it was only applied in civil cases. However, the analogy between the criminal and civil case is obvious when found involved as in the case under discussion. *Injunction Against Execution of Crim. Judg.*, 23 Mich. L. Rev. 57 (1924).

There is a respectable minority authority giving relief in civil cases where the judgment has been obtained on perjury testimony. The Nebraska court in a bastardy proceeding held that the intentional production of false testimony was such fraud as would entitle the convicted to relief after he has exhausted all ordinary legal remedies. *Munro* v.

Callahan, 55 Neb. 75, 70 Am. St. Rep. 366, 75 N.W. 151 (1898). Similar rulings have been made by other courts. *Avocato* v. *Dell'Ara*, 84 S.W. 443 (Texas 1904), *El Reno Fire Ins.* v. *Sutton*, 41 Okla. 297, 50 L.R.A. (NS) 1064, 137 Pac. 700 (1913), *Boring* v. *Ott*, 138 Wis. 260, 19 L.R.A. (NS) 1080, 119 N.W. 865 (1909). Equity when it takes jurisdiction in this type of case does not act on the theory that the judgment is wrong but on the theory that new matter is discovered which for some just reason can't be taken to the law court for its consideration, and the rights acquired in consequence of the judgment cannot be retained in good conscience. *Garland* v. *Rives* 4 Rand. 282 (Va. 1826), *Edenfield* v. *Sayre*, 81 Fla. 367 (1921). 15 Ruling Case Law p 725.

The general rule is that equity will not interfere in criminal proceedings or restrain authorities charged with the execution of the criminal law because equity cannot restrain the people or the sovereign. *In re Sawyer*, 124 U.S. 200, 8 Sup. Ct. 482, 31 L. Ed. 402 (1888), 15 Ruling Case Law p. 725. There are, however, certain well recognized exceptions to this general rule. Equity will interfere where; (1) property rights are involved, *Dobbins v. Los Angeles*, 195 U.S. 223, 25 Sup. Ct. 18 (1904), *Ex parte Young*, 209 U.S. 123 (1907), *Adams* v. *Tanner*, 244 U.S. 590, 37 Sup. Ct. 662, 61 L. Ed. 1336; (2) irreparable injury will result, *Shinkle* v. *City of Covington*, 83 Ky. 420 (1885) or (3) a multiplicity of criminal suits will follow, *Mobile* v. *Orr*, 181 Ala. 308 (1913). In these situations the mandate of the equity court isn't directed to the law court but is directed to the parties and if need be to the executive officers of the law. 15 Ruling Case Law p. 726, *Avocato* v. *Dell'Ara*, *supra*, *Burnside* v. *Wand*, 170 Mo. 531, 71 S.W. 337, 62 L.R.A. 427 (1902). Therefore, although it is admitted that equity could not compel the law court to grant a new trial, equity could restrain the officers from further pursuing the judgment.

A reason frequently given for equity refusing relief in cases like the principal one is that executive clemency may be had. *Weaver* v. *State*, 120 Ohio St. 44 (1929), *People* v. *San Francisco*, 213 Pac. 945 (Cal. 1923), *State* v. *Mohammad*, 189 Cal. 429 (1922). The implication from such objection is that adequate relief may be had elsewhere. The adequacy of this relief may be questioned. A hearing before the pardon board may be denied or the governor may refuse help. After all it is a judicial matter and it seems evident that the court should grant relief.

There is need for some relief other than executive clemency. If the court will not grant it and refuses to adopt the historic precedence of the statute of frauds and statute of limitation cases, it is suggested that the

legislature broaden the scope of Sec. 13449-2 by an amendment worded similar to a Minnesota statute: "Any judgment obtained in a court of record by means of perjury * * * may be set aside by the aggrieved party in an action brought for that purpose within three years after discovery of such perjury * * *." Minnesota Gen. St. Sec. 9405.

H. A. HERBRUCK

EVIDENCE

ADMISSIBILITY IN EVIDENCE OF BLOOD GROUP TESTS — FIRST REPORTED CASE IN OHIO

The recent case in Bowling Green, Ohio, *State ex rel Van Camp* v. *Welling*, 6 Ohio OP. 371, 22 Ohio L. Abs. 448 (1936) is the first reported case in this state recognizing the admissibility in evidence of blood group tests to prove non-paternity in bastardy proceedings. This raises once more the issue which has been previously discussed in a note in 1 Ohio St. L.J. 47 (1935) and in an article by Harriet S. Hyman and Lawrence H. Snyder, "The Use of Blood Tests for Disputed Paternity in the Courts of Ohio," 2 Ohio St. L.J. 203 (1936). The authors point out that it is only in the past few years that American courts have begun to accept the admissibility in evidence of such tests. The states of New York and Wisconsin have taken the lead in this movement, having already passed legislation providing for the making of such tests in appropriate circumstances. The article referred to contains comment on ten unreported Ohio cases in which blood tests have been used. The authors conclude that the fact that so many cases have been referred to them is an indication of a progressive attitude towards blood group tests on the part of the courts of Ohio.

The Welling case was a bastardy proceeding instituted by Verda Van Camp. Defendant filed a motion for an order requiring the plaintiff and her child to submit to a blood test for the purpose of proving it impossible that he could have been the child's parent. The court granted the order as within the inherent power of the court in the exercise of its sound discretion and stated that where execution of the order is properly safeguarded it does not amount to an arbitrary or unreasonable exercise of power. The court pointed out that the absence of statutory authority is not conclusive of the question, and that the reliability of these tests is now adequately established by scientific data. As to the last point, he cited eminent authorities to the effect that such tests are conclusive as to